FILE COPY.

Office Supreme Court, U. S.
FILED
APR 22 1908
JAMES H. McKENNEY,
CLERK

No. 5, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES OF AMERICA, COMPLAINANT,

v.

JOHN F. SHIPP AND OTHERS, DEFENDANTS.

MOTION FOR LEAVE TO TAKE ADDITIONAL TESTIMONY.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES OF AMERICA, complainant,
v.
JOHN F. SHIPP AND OTHERS, defendants.
} No. 5, Original.

MOTION FOR LEAVE TO TAKE ADDITIONAL TESTIMONY

The Solicitor-General, appearing for and on behalf of the United States, moves the court to reopen the hearing of testimony in this case and to reappoint Mr. James D. Maher as commissioner for the purpose of taking and returning additional testimony to the court in this behalf.

In support of this motion the Solicitor-General shows and represents to the court that under the original order of reference to the said commissioner the Government and the defendants took their testimony in the city of Chattanooga, Tenn., in the year 1907, and closed their case in June of that year; that said commissioner subsequently made his report as to the taking of testimony, which was opened, published, and filed pursuant to an order of court; that while, since the taking of testimony was closed as aforesaid, the Government

has made no further effort to find additional testimony, the Department of Justice recently and unexpectedly was informed that two persons who were not examined on the former hearing were eyewitnesses of part of the incidents connected with the lynching of the prisoner, Ed. Johnson, which is involved in this information, and could identify two of the defendants herein as connected therewith; that the Department thereupon caused this matter to be inquired into through the office of the United States attorney for the Eastern District of Tennessee and was advised by him that these two persons will so testify and will identify two of the defendants in question.

The Solicitor-General further represents and shows to the court that he is advised that these two parties did not previously make known their knowledge of these facts in reference to this matter on account of fear, and that there was no means by which the Government could have been previously advised as to the information which they possessed or could have obtained their testimony on the former hearing.

The Solicitor-General further represents and shows to the court that this application for leave to take additional testimony is not made for purposes of delay, but solely that justice may be done and all material evidence brought to the attention of the court.

He therefore prays that the taking of testimony may be reopened, and that the said James D. Maher may be reappointed as commissioner, with the same powers as under his original appointment, and may be directed to proceed at an early and convenient date to the city of Chattanooga, Tenn., there to take the testimony of the two witnesses in question, together with any rebuttal testimony which any of the defendants may desire to offer in that behalf, or further testimony which may be rendered necessary in behalf of the Government by reason of such rebuttal evidence, if any, and to report such additional testimony to the court.

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

NOTICE OF SUBMISSION OF MOTION TO TAKE ADDITIONAL TESTIMONY.

....., ...

ATTORNEYS FOR DEFENDANTS:

Please take notice that on the ..... day of ....., 1908, at the opening of the court, or as soon thereafter as counsel can be heard, a motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said court thereon.

HENRY M. HOYT,
Solicitor-General.

O

FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 8 1908
JAMES H. McKENNEY,
CLERK.

No. 5, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, COMPLAINANT,

v.

JOHN F. SHIPP ET AL.

MOTION OF THE ATTORNEY-GENERAL TO DISMISS AS TO CERTAIN DEFENDANTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, complainant. *v.* JOHN F. SHIPP ET AL.	No. 5, Original.

MOTION OF THE ATTORNEY-GENERAL TO DISMISS AS TO CERTAIN DEFENDANTS.

The Attorney-General, on behalf of the United States, moves that the information herein be dismissed as to the defendants Paul Pool, T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, John Varnell, Joseph Clark, Fred Frauley, Paul or "Sheenie" Warner, Alfred Hammond, William Marquette, and George Brown, and that they be discharged from their respective recognizances entered into pursuant to an order of this honorable court made herein on the 21st day of January, 1907, without prejudice, however, to the right of the United

56257—08

States to prosecute this proceeding as to each and all of the other defendants herein with the same force and effect as if the proceeding against the above-named defendants were not dismissed.

Testimony has been taken and the cases of all parties closed. All of the testimony has been reported by the commissioner, printed, published, and filed pursuant to an order of the court.

Efforts to serve Paul Pool with process in this proceeding have been unsuccessful. He left Chattanooga soon after the lynching and has never since been located, according to our information.

The proof fails to disclose any evidence implicating defendants T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, or John Varnell in the acts complained of in the information.

The defendant John Jones is not the John Jones which the Government witnesses testify to having seen in the lynching party. The witnesses stated positively that he was not the same party (pp. 442, 604).*

Testimony as to the defendants, Joseph Clark, Fred Frauley, Paul or "Sheenie" Warner, Alfred Hammond, William Marquette, and George Brown, is deemed insufficient to justify further prosecution. The proof as to each of these last-named defendants is referred to below:

---

*All page figures herein refer to pages of original record of testimony filed in the United States Supreme Court.

Joseph Clark, a deputy sheriff. The only evidence against Clark was given by Joe Franklin (colored), as follows (p. 522):

> Q. Did you see any of the deputy sheriffs in the crowd?
>
> A. I saw one I knew.
>
> Q. Who was he?
>
> A. Joe Clark.
>
> Q. Where was he?
>
> A. He was in the first bunch. (Meaning the crowd closest to Johnson when he was taken from the jail.)
>
> Q. What was he doing?
>
> A. He either had a shotgun, or had a stick, I don't know which, in his hand.

Upon cross-examination the witness was indistinct as to what crowd Clark was with. He testified:

> Q. * * * Which bunch was he in? (A pause.) You know which bunch he was in without stopping to study, do you not?
>
> A. No, sir; I don't.
>
> Q. You do not know which bunch he was in?
>
> A. I know he was in the crowd.
>
> Q. You do not know whether he was in the first, second, or third bunch, do you?
>
> A. I am not positive.
>
> Q. You are not positive whether he was in the fourth or fifth bunch? Was he not behind the whole crowd?
>
> A. I am not positive.

Q. About what part of the crowd was he in?

A. I am not positive.

Q. Haven't you any idea about it?

A. I am not positive.

Q. Haven't you any idea where he was?

A. I know he was there, but I kept no record of exactly where everybody was.

Q. You have not the slightest idea, and you can not give the court the slightest idea as to what part of that crowd he was in, can you?

A. I know he was in the crowd.

Q. Whereabouts?

A. I couldn't tell you. I know he was on Walnut street.

Q. All you can tell is that you saw him on Walnut street?

A. Yes, sir.

Q. And that is as near as you can describe his position there that night?

A. In the crowd; yes, sir.

Q. You saw him on Walnut street?

A. Yes, sir.

Q. But you will not say whether he was in the first, second, third, fourth, or fifth bunch?

A. I will not.

Q. You will not say whether he was in the front rank, leading the charge, or in the rear rank, coming up with the stragglers?

A. No, sir.

Q. You have not the slightest idea which he was in?

A. Not now.

(pp. 675, 676.)

Q. I am asking you if you have any recollection right now as to where that man was?

A. No, sir; I have not.

Q. You have not the slightest recollection?

A. No, sir.

(pp. 687, 688.)

Fred Frauley, a deputy sheriff. There is nothing tending to show that Frauley was at the jail when the lynchers were there or was present at the lynching or had anything to do with the lynching party. The only evidence unfavorable to him was given by Press Walker (colored), cook at the jail at the time of the lynching. He testified:

Q. Did you hear anything said about anything the Supreme Court had done?

A. Yes, sir; I heard that.

Q. Who was talking about that?

A. Well, Captain Brown told me that a telegram had come, which I had seed it, that there was one come there. A boy brought something there. They said it was a telegram. Of course I didn't read it.

Q. You did not see the telegram yourself?

A. No, sir.

Q. That was before you left?

A. Yes, sir.

Q. You do not know what was in it?

A. No, sir; I couldn't say that.

Q. Did you hear any of the deputies say anything about any telegram?

A. Well, after so long a time, Captain Shipp says, "Now what will you do?" just so, and Mr. Frawley or Mr. Brown said, "Now, you are the sheriff. It is up to you about what to do." They said, "You are the sheriff."

Q. What time did you go away?

A. Well, I think it was near 3 o'clock.

(pp. 290, 291.)

Paul or "Sheenie" Warner. This man sets up an alibi (pp. 830–869), and the only evidence tending to show that he participated in plans for the lynching or the lynching is the following, given by A. J. Ware, an intelligent witness for the Government:

Q. Who were the men that brought out Johnson?

A. I do not know, sir.

Q. Did you recognize them at that time?

A. Well, I thought I recognized one, but I would not make affidavit that I did.

Q. Have you an impression about it?

A. What is that?

Q. Have you a recollection as to whom you recognized?

A. I thought I recognized a young man by the name of Warner.

Q. What is he generally called? Has he a nickname, do you know?

A. "Sheeny" Warner.

Q. How long have you known him?

A. I have known him for a number of years, but, as I told you, I would not swear it was him because his face was blackened to some extent.

Q. His face was blackened?

A. Yes. I could not recognize him for certain, and would not say it was him.

Q. Did you speak to him?

A. No, sir. I did not speak to any one.

(p. 412.)

By Mr. Chamlee.

Q. Relative to Mr. Warner, if you saw him at all that night—the man you referred to, you say, was a man that you could not recognize? You said that he had his face blackened, did you?

A. Yes, sir; there was smut or something on the face of the man.

Q. There was something on the face of the man you referred to, and you could not say that it was Mr. Warner at all, and do not say it now?

A. I would not attempt to say it was him, positively; no, sir.

Q. This was a dark night, and it was dark at the place where you saw him?

A. No; it was light where I saw him. I saw him in the jail lobby.

Q. Still, you do not attempt to say it was Mr. Warner?

A. No, sir.

(p. 424.)

Alfred Hammond. This man sets up an alibi (pp. 623–677), and the only evidence against him is that of John N. Stonecipher, as follows:

A. I went in (saloon) and Padgett had the Morning Times, and the first word he said, he said: "This damn paper has

printed a lie about this lynching." I said, "How do you know it is a lie, Henry?"

Q. What did he answer?

A. Well, he told me he was there.

Q. Did anything further occur in that conversation? What was the condition of his shoes, if you noticed?

A. And just as he said that, Alf. Handman came in.

Q. Is he one of the defendants in this case?

A. Yes, sir; I suppose so.

Q. He came in?

A. Yes, sir; and Henry just turned up his shoe this way. He says, "Why, I haven't got the mud off my shoes yet." Alf. says, "I cleaned mine before I come."

Q. Was anything further said between you at that time?

A. And Henry says, "We did the nigger up all right, didn't we?" Alf. said, "You bet we did." That was all that was said.

(pp. 267, 268.)

It is denied these statements were made (pp. 647, 1038).

The identification of Hammond in this connection is not strong. Stonecipher did not know Hammond at the time, but, upon asking Padgett, was informed that it was he (p. 271). He has not seen Hammond since the occurrence (p. 268).

William Marquette. The only evidence connecting him with the lynching is that of Joe Franklin (colored). He stated that when the lynchers came

out of the jail and went up the street to the bridge where the lynching occurred he saw Marquette in the fourth or fifth crowd behind the one which had Johnson, about 50 yards behind Johnson, but that he never saw him do anything and never saw him near Johnson at all (pp. 520, 600–602).

From this it appears that if Marquette was present at the lynching it was not as a participant.

Marquette sets up an alibi which he supported with considerable testimony (pp. 776–828).

George Brown, a deputy sheriff. Brown was the day jailor (pp. 286, 1295). His official duties were entirely at the jail and commenced at 6 in the morning and ended at 6 at night (pp. 1295, 1296). He had rooms at the jail and spent some of the nights there (p. 286). But about half of the time he went to Hill City, about a mile and a quarter from the jail, when his duties were finished at night (pp. 1292, 1297, 1300). He left the jail at 6.15 the night of the lynching and went to Hill City, where he remained all night (pp. 1298, 1354, 1360, 1361, 1379, 1397, 1402). There is no evidence to contradict these facts.

The only evidence which could be construed as showing that Brown had knowledge that there would be a lynching or that he aided in preparing the jail so that the lynchers would not be opposed in getting Johnson is that relating to the conversation between Shipp, Frauley, and Brown, above set out, and the testimony of Waller, a prisoner

at the jail, that on the afternoon of the day of the lynching he heard Brown, in reply to a question asked by Roach (another prisoner) if he was looking for a mob that night, say "it looked pretty warm outside" (pp. 450, 487). Brown denies making this statement (p. 1307).

A number of witnesses testified to Brown's good character (pp. 1351, 1362, 1379, 1380, 1385, 1390, 1406, 1418, 1423).

Upon the above state of the evidence it clearly appears to be the duty of the Attorney-General to move to dismiss the information as to the defendants herein enumerated, and accordingly this motion is submitted to the court after due notice to and service upon all counsel in the cause.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

OCTOBER, 1908.

O